2. Respondent would have the Court believe that our only cases cited here as conflicting with the decision below were *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963), and *Papachristou* v. *City of Jacksonville*, 405 U.S. 156, 40 L.W. 4216 (1972). Quite apart from its invalid attempts to distinguish those cases, Respondent fails to note, or to even attempt to deal with, *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), repeatedly cited by Petitioner here, which was also cited below.

3. Respondent errs when it states that "No constitutional principle was involved or presented to the Court below." (Brief, p. 10.) The raising of the Constitutional questions is set forth on page 20 of our Petition.

4. Respondent stresses its claim that Petitioner "did not assert any legal or moral ground for setting aside the stipulation." (Brief, p. 14.) This is completely untrue. As noted in the decision in that case by the Supreme Court of Utah, *United Factors* v. *T. C. Associates, Inc.*, 21 Utah 2d 351, 353, 445 P. 2d, 766, 768:

> "Defendants [which included Petitioner] alleged in their motion that the stipulation provided that they pay a sum of money in excess of what they guaranteed, that if the payments were not made plaintiff could enter judgment and that defendants had a justifiable defense, and that the previous payments under the stipulations were made under a mistake of law and fact and that they should not be deprived of their day in court. Accompanying defendants' motion was an affidavit of Herscovitz stating that he made a mistake at the time of signing the stipulation in that he believed that the law made him obligated for the entire indebtedness rather than for the amount he signed as a guarantor and that he now believes that under the law his maximum liability is only the amount of the guarantee. He further stated that he believed

that plaintiff had permitted the corporate defendant to exceed the amount of the guarantee; and, therefore, the entire amount may be uncollectible. Defendant concluded that it would be a miscarriage of justice to permit plaintiff to take judgment under the stipulation in view of the newly discovered facts and law.'" Footnote 2 to the opinion recited as follows:

> "It is defendants' contention that the terms of the written guarantee, which specified no monetary limitation and provided that the terms and conditions may not be limited or amended without written consent, were in fact subsequently modified by an oral agreement confining the guarantors' liability to a $10,000 limit."

Nor, indeed, is there any support in the page cited by Respondent from the record, whose relevant parts are quoted in full in the margin below,[1] for Respondent's statement that petitioner's first attorney was "embarrass[ed] • • • to the extent that he withdrew from the case • • •." (Brief, p. 14.)

5. Respondent recites that Petitioner's position with regard to Rule IX "is diametrically opposed to the position he adopted before the Supreme Court of Utah on the same Rule", where, Respondent opines, Petitioner referred to the "clarity" of the rule. However, in the written argument referred to by Respondent, Petitioner had merely referred to the clarity of that part of the Rule providing for the right to cross-examine, and did not refer to that part of Rule IX permitting the denial of qualifica-

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[1] "I told Mr. Saperstein on several occasions that under the terms of the stipulation it would be necessary for me to file such an affidavit and take judgment unless payments were forthcoming. He finally told me he was withdrawing from the case because Mr. Herscovitz told him that he was not going to abide by the stipulation. He wanted to contest the matter."

tion for failure to remove any and all reasonable suspicions of moral unfitness. The paragraph of such written argument, from which the word "clarity" was taken out of context by Respondent, is reproduced in full in the margin below.[2]

6. Respondent makes much of the unsupported opinion of one Alvin I. Smith, Esq., who Respondent recites is "a member of the Utah Bar in good standing for thirty-five years" (Brief, p. 14), because Mr. Smith would never enter into a stipulation with Petitioner, presumably because Petitioner had once sought to set aside a stipulation (*supra*, p. 2). Interestingly enough, Mr. Smith himself recently unsuccessfully sued to set aside his own promissory note on the ground of mutual mistake, which note he had himself drafted. The Supreme Court of Utah found a unilateral mistake on his part, at best, and denied him the requested permission to set aside his own note. *Skouser* v. *Smith*, —— Utah 2d ——, 493 P.2d 1003 (1972).

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[2] "Rule IX, as amended, Sec. 9-1 of the Bar Rules is the statutory and notice giving statute of the law governing admission to practice in the State of Utah. This rule provides:

> The Secretary of the Board shall notify the applicant of:
>
> The matters adverse to applicant which were disclosed by the preliminary hearing or hearings:
>
> If such matters were based in whole or in part upon adverse statements from other persons, the names of such persons; and
>
> The applicant's right to be represented by counsel at the hearing, to examine and cross examine witnesses * * * and for such purpose to make reasonable use of the Board's subpoena powers.

"Despite the clarity of this rule the Board did not produce at the Hearing either in person or by Affidavit, David Holther, John Allen, Ray Twelves, any member of the Weber County Committee or any letters or reports of same. The Petitioner was totally deprived of any right of cross examination or confrontation in derogation of every concept of Federal and State constitutional rights, privileges and immunities as has been herein set forth."

CONCLUSION

This Court should grant certiorari and reverse the judgment below.

Respectfully submitted,

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